



DATE: March 24, 1988  
CASE NO. 87-INA-579

IN THE MATTER OF  
  
AQUARIUS ENTERPRISES

Employer

DARIO CONCHAS CABRAL

Alien

BEFORE: Litt, Chief Judge; Vittone, Deputy Chief Judge; and Brenner, DeGregorio, Fath,  
Levin, and Tureck, Administrative Law Judges

**DECISION AND ORDER  
DENYING LABOR CERTIFICATION**

This proceeding was initiated by the above named Employer who requested administrative-judicial review, pursuant to 20 C.F.R. Section 656.26, from the determination of a Certifying Officer of the U.S. Department of Labor denying an application for labor certification which the Employer submitted on behalf of the above named Alien, pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14) [hereinafter, the Act].

Under Section 212(a)(14) of the Act, an Alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that at the time of application for a visa and admission into the United States and at the place where the Alien is to perform the work (1) there are not sufficient workers in the United States who are able, willing, qualified, and available for employment and (2) the employment of the Alien will not adversely affect the wages and working conditions of United States workers similarly employed.

The procedures governing labor certification are set forth at 20 C.F.R. Part 656. An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. §656.21 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

This review of the denial of labor certification is based on the record upon which the denial was made, together with the request for review, as contained in an Appeal File [hereinafter, AF], and any written arguments of the parties. 20 C.F.R. §656.27(c).

### Statement of the Case

Aquarius Enterprises, a California business, applied for a labor certification for the alien to work as a Flexographic Press Operator in a shop printing specialized advertising that includes both lettering and designs on the reverse of cash register receipts. There is only one other shop west of Chicago that produces the same type of printing as done at Aquarius.

As required by the regulations, the employer advertised the job. It required familiarity with all aspects of advertising printing, and a minimum of one year experience on the flexographic press. The wage offered was \$7.00 per hour for a forty hour week with approximately seven hours of overtime at time and one-half.

The alien has been in the position since August, 1983. His employment history shows that he held a job as a Flexographic Press Operator in a similar business for a year and one-half before going to work for Aquarius. The record shows no other qualifications either in schools attended or in vocational training.

There were no applicants for the job.

### Notice of Findings

The Certifying denied the labor certification on grounds:

The employer is in non-compliance with 20 CFR 656.21 (b)(2)(i) of the regulations. The one year experience requirement appears unduly restrictive, not a normal requirement for the occupation and precludes the referral and consideration of qualified U.S. applicants. Standard preparation time in the occupation of FLEXOGRAPHIC PRESS OPERATOR 651.682-010 per D.O.T. is 3 to 6 months. Since alien was hired in the same position by a previous employer with no experience whatever, employer must submit evidence more than 3 months is required to perform this job.

The employer was instructed to justify the restriction or readvertise with a reduced experience requirement.

The employer did not readvertise, but its president responded: "I have found it absolutely essential for a press operator to have a minimum of 1 years experience as as (sic) flexographic press operator for them to be able to complete the duties as outlined in both the application and the advertisement for employment". He concedes that six months of training may be enough to enable an operator to work independently under ordinary conditions, but for highly specialized

work a more experienced operator is required. Moreover, he contends that the hiring practices of other employers have no bearing on his case.

In his request for review, the employer maintains that it clearly established a business necessity for the experience requirement in its position. The Certifying Officer's determination was characterized as erroneous, null and void, and of no consequence.

### Discussion

The employer's argument expresses a preference rather than a business necessity for a flexographic press operator with a year or more of experience. Though there is a claim that the work of this shop is distinctive and unique, neither the rebuttal nor the request for review distinguishes in detail the employer's work from that of any other shop. In other words, there is no need shown for a specially qualified operator to perform the employer's work.

The Certifying Officer correctly pointed out in the notice of findings that the Dictionary of Occupational Titles classifies Flexographic Press Operation as a job that is ordinarily learned in three to six months.

The employer in this case hired and trained the alien in its "specialized" work, which provided the alien with unique qualifications. Moreover, by virtue of the alien's experience and tenure on the job, he holds a competitive edge to the disadvantage of the U.S. worker. The job is fashioned to the alien. When these considerations are added to the employer's desire to keep the alien, there appears to be little chance for employment of the U.S. worker.

The presumption that there are U.S. workers for the job, and the apparent biases accruing to a tenured alien can be overcome by a good faith, intensive recruitment campaign for workers, which persuasively shows that there are no U.S. workers who are able, willing, qualified, and available for the job. The burden of proof (persuasion) is on the employer and the alien.

Aquarius did not carry its burden of proof. The requirement that the applicant have one year of experience on the Flexographic Press was greater than that needed for the job. The employer refused even the basic training that might be expected for any new employee. Other than the general statement of the employer, there was no evidence that one year of experience was a business necessity. There is merit in the employer's complaint that the practices of other employers have no bearing on his case, but the practices of other employers support reliance on the qualifying experience cited in the Dictionary of Occupational Titles.

It is concluded that the job requirements advertised by the employer were overly restrictive for a Flexographic Press operator, and the finding of the Certifying Officer must be affirmed.

## ORDER

It is ADJUDGED AND ORDERED that the Certifying Officer's denial of a labor certification in this matter be and is hereby affirmed.

GEORGE A. FATH  
Administrative Law Judge

Jeffrey Tureck, Administrative Law Judge, dissenting

I cannot concur in the decision of my colleagues, which I believe to be factually incorrect and inconsistent with our previous decision in the case of Gencorp, 87-INA-659 (January 13, 1988). Moreover, I see no reason to once again overlook serious faults in a Certifying Officer's Final Determination. I would reverse the Certifying Officer and grant certification.

First, the majority appears to be under the impression that experience in the allegedly specialized work performed by the employer was a requirement for the job and that, by working for the Employer, the Alien has an unfair advantage over the other potential job applicants. However, the description of the position made no reference to any specialized work experience, instead imposing a general requirement of a year's experience as a Flexographic Press Operator. The Alien had this experience before he started working for the Employer.

Second, although seeming to accept the fact that Employer's work is specialized for the purposes of this part of the discussion, the majority had previously rejected Employer's contention that its business was specialized, finding that:

Though there is a claim that the work of this shop is distinctive and unique, neither the rebuttal nor the request for review distinguishes in detail the employer's work from that of any other shop. In other words, there is no need to shown for a specially qualified operator to perform employer's work.

(Majority decision at 3). The majority cannot have it both ways. If the Alien obtained "unique qualifications" by doing Employer's specialized work (id. at 4), then the Certifying Officer's finding that Employer has not documented that it performs specialized work, then the Board cannot find that the Alien received unique training while working for Employer.

Third, the text of the Final Determination is 13 lines long. Much of the text is devoted to a discussion of the prevailing wage, an issue never before raised in this case. Not only is it first raised in the Final Determination, but the Certifying Officer is wrong in saying that Employer is offering less than the prevailing wage. The prevailing wage as determined by the local Job Service was \$7.25/hour (AF 10). Although Employer offered the job at \$7.00/hour, this is within 5% of \$7.25 an hour; therefore, Employer's wage meets the prevailing wage. See 20 C.F.R. §656.40(a)(2)(i).

It is difficult to pass this off as harmless error. For the Certifying Officer uses Employer's alleged failure to pay the prevailing wage as proof that the job is question is not specialized and does not require more experience than is typical for Flexographic Press Operators. His delving into the prevailing wage issue at this point in the certification or merely an illustration of why he believed the job did not require specialized experience. Employer should have been given the opportunity to rebut this finding by the Certifying Officer.

Fourth, the only defect raised in the Notice of Findings was that Employer's one-year experience requirement was unduly restrictive, since the D.O.T. only requires three to six months of experience for a Flexographic Press Operator. In rebuttal, Employer pointed out that its business is unique, there being "only one other company west of Chicago that produces the same type of printing ...." (AF 6). Employer further stated that hiring workers with less than a year's experience has proved unsatisfactory.

The Certifying Officer devoted a total of 17 words to this aspect of his decision, asserting that Employer "submits no documentation of this fact." (AF 3). That is the sum and substance of his decision in this case on the only issue before him -- that there is no documentation of the one year's experience requirement.

On January 13, 1988, this Board issued its decision in Gencorp, supra. In that case, we unanimously held that, unless the regulations require sepcific documentation to be produced or the Certifying Officer requires the production of a readily available document, "documentation" can be satisfied by reasonably specific written assertions. Employer's written assertions that: (1) it is a unique business; and (2) that its previous hiring of employees with less than a year's experience has proved unsatisfactory, meet the standards set out in Gencorp. The Certifying Officer's statement that Employer failed to provide documentation for the one year's experience requirement is inconsistent with our holding in Gencorp.

The majority appears to be content to overlook the fact that Employer's rebuttal of the Notice of Findings satisfies the standard set out in Gencorp. Rather than remanding the case to the Certifying Officer to discuss whether the documentation provided was sufficient, the majority instead reads such a finding into the Certifying Officer's terse decision, an action which is unsupported by the record.

Therefore, neither the Certifying Officer's Final Determination denying certification nor the majority's affirmance of that denial are legally or factually correct. At least, the Board should have remanded the case to the Certifying Officer to make findings consistent with Gencorp. However, I would reverse the Certifying Officer's determination and grant certification.

JEFFREY TURECK  
Administrative Law Judge